

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOHN M. KIVLIN,

Plaintiff,

v.

CITY OF BELLEVUE, A municipal  
corporation, and PATRICK C. ARPIN, and  
CARL KLEINKNECHT, JOHN DOES  
NOS. 1 to 2 in their individual and official  
capacities,

Defendants.

No. 2:20-cv-00790 RSM

PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**CORRECTED**

Respectfully submitted this 11th day of May, 2021.

LAW OFFICE OF PATRICIA S. ROSE

s/Patricia S. Rose

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PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-1  
2:20-cv-00790 RSM

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## I. INTRODUCTION

In the summer of 2018, John Kivlin, a career Traffic Division officer of the Bellevue Police Department (hereinafter “BPD” or “the Department”), was subject to an extensive internal employment investigation and charged by King County with serious criminal conduct. The allegations arose from frivolous, unsubstantiated allegations of physical and sexual assault made by a woman named Idunn Schneider. In the fall of 2017, he and Ms. Schneider began a consensual extramarital sexual relationship that continued during the period from mid-September 2017 to late April 2018. After Mr. Kivlin ended their relationship, Ms. Schneider made numerous defamatory allegations about Mr. Kivlin’s on-and off-duty conduct in a successful attempt to end his career with BPD. Their referral to the State’s Criminal Justice Training Commission (hereinafter “CJTC”) resulted in a decertification process that has precluded his ability to serve as a certified peace officer virtually anywhere.

After BPD participated in and publicized his arrest on April 28, 2018, BPD management placed Mr. Kivlin on indefinite administrative leave while the criminal investigation proceeded. From April 28 to July 24, BPD departed from its typical practice and actively pursued an internal investigation relying primarily on the allegations from Ms. Schneider, and issued four written advisements of distinct charges of investigation based on alleged policy and/or conduct violations culminating with a July 24 Notice of Intent to Terminate. Knowing that Mr. Kivlin was under severe emotional distress and facing

1 criminal prosecution on her bogus criminal charges which had resulted in substantial media  
2 attention throughout the region, BPD placed Mr. Kivlin in the Hobson's choice of potential  
3 violation of his 5th Amendment rights or losing his career for not cooperating with the  
4 internal investigation. Faced with this choice, a reasonable person would do as Mr. Kivlin  
5 did. He gave notice that he wished to separate from the Department on July 6, 2018. He did  
6 so before final completion of the investigation to avoid further embarrassment, humiliation  
7 and invasion of his family's privacy, and after union leadership advised, even without his  
8 involvement, that BPD was finalizing its proposed discipline and that a termination  
9 recommendation was imminent. After its receipt on July 24, in King County jail where Mr.  
10 Kivlin was detained on further false allegations, Mr. Kivlin nonetheless sought a  
11 *Loudermill* hearing when his resignation was not accepted at the time he was provided the  
12 Notice of Proposed Termination. After his *Loudermill* hearing request, Assistant Chief  
13 Patrick Arpin accepted his resignation effective August 2, thereby preventing his exercise  
14 of his procedural due process right for an opportunity to respond to the allegations and  
15 other post-termination relief under his collective bargaining agreement and/or the City's  
16 internal dispute resolution procedures.  
17  
18

19 Months after his separation, in October 2018, King County abandoned its criminal  
20 prosecution as Ms. Schneider's claims were wholly discredited. Nonetheless, *on June 18,*  
21 *2019, just under a full year after Mr. Kivlin left BPD and more than six months after his*  
22 *exoneration, the State of Washington Criminal Justice Training Commission issued three*  
23 *charges against him arising primarily from his interactions with Ms. Schneider.* There was  
24 no true identity of issues between the proposed separation allegations and the charges raised  
25

1 by the Commission and Ms. Schneider had fled the jurisdiction after the King County  
 2 Prosecuting Attorney charged her with cybercrimes such as “spoofing” the allegations  
 3 made against Mr. Kivlin. Although he did not prevail before the CJTC, the statutory and  
 4 common law claims raised in Mr. Kivlin’s civil litigation are not subject to collateral  
 5 estoppel and are not subject to summary judgment because of alleged absolute immunities  
 6 and defenses.

## 7 **II. EVIDENCE RELIED UPON**

8  
 9 Plaintiff relies upon the testimony and evidence contained in the statement of facts  
 10 *infra*, the Declaration of John Kivlin and exhibits thereto, the Declaration of Bryce Corey  
 11 and exhibit thereto, the Declaration of Patricia S. Rose and exhibits thereto, and any cited  
 12 evidence contained in Defendant’s Motion and/or Reply, if any, including documents and  
 13 evidence submitted to the State of Washington Criminal Justice Training Commission  
 14 proceedings which are attached as Exhibit A to the Freeman Declaration accompanying  
 15 Defendant’s motion (Dkt No 16 P) and will be referenced by the Bates numbering provided  
 16 by Defendants, e.g., Dkt 16-1, Ex. A 0000.

## 17 **III. STATEMENT OF FACTS<sup>1</sup>**

### 18 **A. Kivlin’s Employment History with the Bellevue Police Department** 19 **And His Personal and Professional Reputation**

20  
 21 Petitioner John Kivlin (hereinafter “Kivlin”) had been employed by the Bellevue  
 22 Police Department for sixteen years at the time of the events leading up to submittal of his  
 23

24  
 25 <sup>1</sup> This statement of facts is based on the evidence identified in Section II above, Defendants’ pleadings and  
 other pleadings already on file in this matter.

1 resignation on July 6, 2018. That resignation was accepted on July 31, 2018 and was  
2 intended to be effective on August 2, 2018.. For much of that time he was a motorcycle  
3 officer or traffic officer assigned to the Traffic Division. In early February 2018, after  
4 testing, he was reassigned to the role of Collision Investigator and taken off the Motors and  
5 Traffic Unit. *Id.* at Ex A. 0000. During his employment, he had a reputation as an honest,  
6 reliable employee who was consistently willing to provide support to his peers and chain of  
7 command.  
8

9 During the time period at issue in this case, i.e., November 2017 through his  
10 separation from work, Kivlin reported directly to then Captain David Sanabria and Sergeant  
11 Michael Shovlin. During this period, neither his peers, e.g., Welty, nor their supervisors or  
12 others in the chain of command entertained any doubts or concerns about any aspect of  
13 Kivlin's work performance, reliability and attendance, work ethic, honesty or truthfulness,  
14 or any other aspect of his employment before late April 2018. *See* Welty, Sanabria, Shovlin  
15 testimony in Dkt 16-1, Exhibit A, and Declaration of Bryce Corey accompanying this  
16 response at ¶7.  
17

18 **B. Relevant Events Leading to Kivlin's Resignation**

19 At the time period relevant to this dispute, i.e., September 2017 through August  
20 2018, Kivlin worked closely with a fellow officer, Robert Welty (hereinafter "Welty").  
21 Both Kivlin and Welty resided in Gig Harbor and often commuted to work together, and  
22 both were reassigned to the Collisions Investigations unit at the same time. Welty Test. at  
23

24 .  
25

On April 28, 2018, false reports were made to the Department by Idunn Schneider, an individual with whom Kivlin had just ended a consensual extramarital affair. On that day, Idunn Schneider contacted the Department and made a false report to the Department that several weeks earlier Kivlin had physically assaulted her and struck her in the face. Dkt 16-1 Ex A\_\_\_\_\_.<sup>2</sup>

Ms. Schneider's action led to Kivlin's immediate arrest and incarceration at approximately 1:00 a.m. on April 28, 2018. He was immediately placed on administrative assignment or leave with pay by the Department while its management initiated an internal investigation. See Kivlin Declaration accompanying this response at ¶\_\_\_\_ (hereinafter "Kivlin Dec."). The internal investigation ultimately included the May 2018 retention of an external investigator, attorney Kathleen Weber of the law firm Inslee Best Doezie and Ryder, P.S. See CJTC Exhibit 18, Dkt 16-1, Ex A 000085-00199 It also led to the filing of mutual protection orders between Schneider and Kivlin's family and other unsubstantiated criminal charges directed at Kivlin's conduct during the period from May 2018 through November 2018. See Kivlin Dec. (passim).

At the time that he entered into the relationship with Ms. Schneider, Kivlin was not aware that she had a prior history of making unsupported allegations of physical and sexual assault against others including law enforcement officers, or that she had a prior history of suicide threats and mental health treatment including involuntary commitment. This continued during the period at issue here. See Kivlin Dec., Exs. \_\_\_\_\_.<sup>4</sup> Additionally,

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<sup>2</sup> Ms. Schneider also reported that Kivlin had run her license plate through a statewide database referred to as ACCESS to obtain information about her.

1 during the internal investigation of Kivlin, it was revealed that, contemporaneous with her  
2 allegations against Kivlin, Ms. Schneider had made similar claims against another BPD  
3 Detective and also against Bellevue Police Chief Steven Mylett that were proven false. See  
4 Kivlin Dec. at ¶\_\_\_\_.

5 It is undisputed that during the early months of their relationship, the woman now  
6 known to be Idunn Schneider deliberately lied to Kivlin and disguised her true identity by  
7 providing a false first name and false age to Kivlin. *Id.* at ¶9. She also misled him as to her  
8 profession, her children, and other details about her life. Within a month of their interaction,  
9 Kivlin began to have doubts about the veracity of her statements to him. Nonetheless, he  
10 continued to see her and confront her about her statements to him, both in person and in a  
11 voluminous number of text messages that they exchanged. Ultimately, Kivlin learned that  
12 her name was not “Hannah” and that she was almost twenty years older than she had  
13 indicated to him. Because of his suspicions, on several occasions Kivlin used the ACCESS  
14 database available to law enforcement personnel to research her license plate. See Kivlin  
15 Dec. at ¶10. He advised her that he was doing so. *Id.*

16 Kivlin attempted to end the relationship with Ms. Schneider on several occasions  
17 and formally did so after his spouse learned of the affair. Not surprisingly, Kivlin’s  
18 disclosure created an immediate rift in his marriage. As a result, he moved out of their  
19 residence but remained in the Gig Harbor area to be near his children. *Id.* at ¶11. Despite  
20 this, shortly thereafter he learned that Ms. Schneider had made a 911 call indicating that she  
21 was traveling to his residence and intended to kill him and “commit suicide by cop.” Kivlin  
22 Dec. at ¶12\_\_\_\_ and Ex. \_\_\_\_\_.  
23  
24  
25

On April 30, 2018, the day that Kivlin was arraigned, he also learned that Ms. Schneider had alleged he had violated the no-contact order, escalating the matter to a felony due to the nature of the reported threats. On or about May 4, 2018, Ms. Kivlin learned that Ms. Schneider had been seen near his new residence and his family's residence and ultimately was detained very close to both by law enforcement and placed on a 72-hour involuntary commitment hold because of her statements and disoriented presentation. *Id.* at ¶14-15 Ex.5.

### C. The Department's Internal Investigation

Following the BPD's initial placement of Kivlin on administrative assignment, he never returned to work. Additionally, charges were made by mid-May and a contracted lawyer/investigator, Kathleen Weber, was retained in mid-May 2018 to follow up on the increasing allegations made by her. Kivlin Dec at ¶17. During May and July 2018, Kivlin was placed under arrest and detained in jail a total of three times because of repeated false statements made by Ms. Schneider to law enforcement about his alleged violation of the no-contact orders, threats, and intimidation when the record reveals that it was she who was engaged in this conduct. Kivlin Dec. at ¶18. He also received four separate Notices of Advisement of Formal Standards Investigations being conducted by BPD. *Id.* and Exs. 8-11. ¶

With his marriage crumbling, his work life in jeopardy, and facing criminal charges, Kivlin was not emotionally or legally prepared to be interviewed during the internal investigation in mid-June 2018 and he cancelled an appointment for such an interview. No

1 effort was made to reestablish an interview time before the investigation was completed on  
2 or about July 23, 2018. See Dkt No. 16-1, CJTC Exhibit 10, Ex. A.

3 Based on his long tenure with BPD and conversations with his union, Kivlin  
4 believed that the Department's policy and practice was to maintain a BPD employee  
5 involved in a criminal investigation on leave status until the criminal investigation and/or  
6 prosecution was complete. Kivlin Dec. at ¶15. This understanding is reinforced by language  
7 in the Union contract. *Id.* at Ex.4 and the testimony of former Union official Bryce Corey.  
8 See Corey Dec. at ¶6.

10 The investigative report was completed and submitted on July 23 contained no  
11 formal recommendations for disciplinary action and was not provided to Kivlin, Unaware  
12 of the status of the investigation prior to its completion and well before the Department's  
13 issuance of written notice of proposed termination, Kivlin resigned his position on July 6,  
14 2010. Kivlin Dec. at Ex11. He did so to avoid further stress and impact on his family  
15 because of unsolicited press coverage regarding the events leading to his investigation, and  
16 because he understood that the decision would stop the internal investigation and limit the  
17 reputational harm flowing from his discharge. Nonetheless, on July 9, while in jail, he  
18 received a final, fourth Advisement of Formal Standards Investigation after he indicated  
19 his intent to resign on July 6 See Ex.11 to Kivlin Dec.

21 **D. End of Kivlin's Employment, Subsequent Charges before**  
22 **the Commission, and Criminal Charges**

23 After receipt of the final notice of Intent to Terminate, he promptly asked for a  
24 *Loudermill* hearing in writing even though he was still incarcerated. *Id.* Without any  
25

1 acknowledgment of that request, Acting Chief Arpin simply “accepted” his resignation  
2 effective August 2, 2018. See Kivlin Dec. at Ex.14.

3 Between June and August 2018, Kivlin was charged by the King County  
4 Prosecuting Attorney with several criminal charges including assault, tampering with a  
5 witness, and violation of a protection order. Those charges were dismissed with prejudice  
6 after forensic evidence revealed that Ms. Schneider had “spoofed” and created false  
7 evidence regarding her interactions with Kivlin as well as against Chief Mylett. Kivlin  
8 Dec., Ex. 15. She was later charged with malicious prosecution and tampering with  
9 physical evidence but she left the country before she could be apprehended or prosecuted.  
10 See Kivlin Dec, ¶22,

12 **E. Deficiencies in the Administrative Proceedings Before the CJTC**

13 On August 2, 2018, the exact day of his resignation, defendant Kleinknecht referred  
14 Kivlin to the CJTC. Dkt 16-1, Ex A 000057. Close to a year after the criminal charges  
15 were dismissed and after his resignation from BPD, on June 24, 2019 CJTC issued three  
16 charges that could be the basis for decertification as a police officer under RCW 43.101 *et*  
17 *seq.* Dkt 16-1, Ex A, p. 000010-11. The alleged factual basis for the charges, in summary,  
18 were: unauthorized use of the ACCESS database for non-law-enforcement purposes;  
19 misrepresenting his need for sick leave on November 22, 2017 to have a rendezvous during  
20 work hours with Ms. Schneider; and misrepresenting his availability for an off-duty callout  
21 for investigation of a fatality accident on February 19, 2018 to rendezvous with Ms.  
22 Schneider. *Id.*

1 Kivlin timely appealed and retained counsel. A three-person panel composed of  
2 several law enforcement management and a professor of criminal justice was convened to  
3 hear the appeal. Both the Commission staff prosecuting the appeal and the panel hearing the  
4 appeal were represented by Assistant Attorney Generals. Dkt 16-1, Ex. A, passim.

5 There were no line officers or detectives or other peers of Kivlin on the panel.  
6 Unlike a judicial proceeding, none of the panel members, including Presiding Officer Sean  
7 Madison of the Sequim Police Department, had substantive legal training, so an Assistant  
8 Attorney General was assigned to assist him in making evidentiary and legal decisions and  
9 preparing all the pleadings and decisions of the panel both at pre-hearing conferences and  
10 during the hearing itself. *Id.* See e.g. \_\_\_\_\_  
11

12 In a pre-hearing conference conducted on December 4, 2019 to review proposed  
13 exhibits and witness lists of both parties, Presiding Officer Madison refused to admit  
14 Kivlin's proposed exhibits that contained relevant documentary evidence to rebut hearsay  
15 evidence from BPD's internal investigation documents, many of which contained  
16 prejudicial and inaccurate statements attributed to or based on Ms. Schneider's false  
17 allegations regarding him and that were not even the basis of the charges made by the  
18 CJTC. *Id.* at Ex A, p. 0000\_\_\_\_. Specifically, Sgt. Madison refused to admit Kivlin's  
19 exhibit which was a series of documents related to Ms. Schneider's past history of false  
20 allegations of sexual assault. *See* Exhibit 2 to Kivlin Dec. Sgt. Madison also refused to  
21 admit Kivlin's exhibit that demonstrated conduct of Ms. Schneider contemporaneous with  
22 the period when she made allegations against Kivlin that led to his placement on  
23 administrative leave as well as the criminal charges. *See* Kivlin Dec. Ex. 7. Sgt. Madison  
24  
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26 PLAINTIFF'S RESPONSE TO  
27 DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-11  
2:20-cv-00790 RSM

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1 also prevented Kivlin's attempt to admit evidence that he was advised by administrators of  
2 the ACCESS program that he was not permanently barred from use of its databases but  
3 would need to renew his training consistent with their customary practice upon  
4 reemployment in criminal justice field. *See* Kivlin Dec. at Ex 16. Most important, Kivlin  
5 had no opportunity to impeach Ms. Schneider based on the numerous defamatory  
6 allegations she made regarding him and that formed the nucleus of the BPD investigation  
7 and/or allegations leading to his separation and the CJTC proceedings, all of which were  
8 provided in full to the panel. As result, although the panel did not sustain one charge, it  
9 order Mr. Kivlin's decertification based on the ACCESS violation and his communications  
10 regarding the call back/fatality accident despite evidence of disparate treatment of similarly  
11 situated officers on each charge. It is undisputed that those findings and conclusions were  
12 upheld on judicial review to King County Superior Court and have not been further  
13 appealed,  
14

15 **F. Procedural History of This Complaint**

16 On April 28, 2020, Kivlin filed this action in King County Superior Court two  
17 years after Defendant Arpin's communications regarding Plaintiff's arrest to KOMO TV  
18 and shortly before the City's subsequent issuance of a press release regarding the same  
19 event. After accepting service of the pleadings, and retention of counsel, on or about May  
20 27 2020, Defendant removed the complaint to this Court. Dkt No.1 The parties agreed to  
21 stay discovery until after submission of this anticipated motion which would turn on  
22 questions of primarily. Dkt No. 12. The Court granted this relief and rescheduled key  
23 deadlines in this case. Dkt No. 14. This Motion followed. Dkt No. 15.  
24  
25

26 PLAINTIFF'S RESPONSE TO  
27 DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-12  
2:20-cv-00790 RSM

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**IV. ISSUES PRESENTED**

1. Under federal and state common law of issue preclusion and/or collateral estoppel, should Kivlin's complaint for damages be dismissed as a matter of law?

Answer: No.

2. Under Washington common law of witness immunity, should Kivlin's complaint for damages be dismissed as a matter of law?

Answer: No.

3. Are there genuine issues of material fact in dispute as to elements of Kivlin's defamation claim that preclude dismissal as a matter of law?

Answer: Yes.

4. Are there genuine issues of material fact in dispute as to elements of Kivlin's injurious falsehoods claim that preclude dismissal as a matter of law?

Answer: Yes.

5. Are there genuine issues of material fact in dispute as to elements of Kivlin's false light / invasion of privacy claim that preclude dismissal as a matter of law?

Answer: Yes.

6. Are there genuine issues of material fact in dispute as to whether Plaintiff was constructively discharged by the BPD that preclude dismissal as a matter of law?

Answer: Yes

7. Are there genuine issues of material fact in dispute as to whether BPD wrongfully discharged Kivlin in violation of promises of specific treatment in specific situations that preclude dismissal of this claim as a matter of law?

Answer: Yes.

8. Are there genuine issues of material fact in dispute as to whether BPD wrongfully discharged Kivlin in violation of a clear mandate of public policy found in Article 1, Section 7 of the Washington State Constitution that preclude dismissal of this claim as a matter of law?

Answer: Yes.

9. Are there genuine issues of material fact in dispute as to the individual defendants, acting under color state law, violating Kivlin's constitutional rights under the 14th Amendment to the United States Constitution that preclude dismissal of Kivlin's claim under 42 US §1983 as a matter of law ?

Answer: Yes.

PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-13  
2:20-cv-00790 RSM

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## V. ARGUMENT AND AUTHORITY

### A. Summary Judgment Standards Applicable to This Case

On a motion for summary judgment, this Court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006). Summary judgment is only appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment *as a matter of law*. Fed. R. Civ. P. 56(a), *emphasis added*. The moving party must show *the absence* of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue is “genuine” if a reasonable jury could return a verdict in favor of the non-moving party. *Rivera v. Phillip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A fact is “material” if it could affect the outcome of the case. *Id.* The court defers to neither party in resolving purely legal questions. *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999). However, it is also not this Court’s role to weigh the disputed evidence and decide which is more probative, or to make credibility determinations. *See Anderson, supra*.

### B. Federal and State Law on Issue Preclusion Does Not Preclude Litigation of all of Kivlin’s Claims Here

#### 1. Collateral estoppel is not intended to prevent a full and fair hearing on the merits of Kivlin’s constitutional and common law claims when there are disputes as to some of the elements.

Federal courts “determine the preclusive effect of a state court judgment by applying that state’s preclusion principles.” *ReadyLink Healthcare, Inc. v. State Comp. Ins.*

PLAINTIFF’S RESPONSE TO  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT-14  
2:20-cv-00790 RSM

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1 *Fund*, 754 F.3d 754, 760 (9th Cir. 2014). *See Semtek Int’l Inc. v. Lockheed Martin Corp.*,  
 2 531 U.S. 497, 508 (2001). Aside from Kivlin’s §1983 claim, on which both state and  
 3 federal courts have jurisdiction, all of the claims here arise under Washington law. Thus,  
 4 the court should apply Washington’s common law of issue preclusion although it is similar  
 5 to the federal common law. It is designed to prevent relitigation of issues already actually  
 6 litigated by the parties and previously decided by a competent tribunal in order to promote  
 7 judicial economy and convenience to parties. *See e.g., Hadley v. Maxwell*, 144 Wash.2d  
 8 306, 311, 27 P.3d 600 (2001). *Reninger v. Dep’t of Corr.*, 134 Wash.2d 437, 449, 951 P.2d  
 9 782 (1998). The *Hadley* court recognized its limited utility:

11 Collateral estoppel is, in the end, an equitable doctrine that will not be applied  
 12 mechanically to work an injustice. To that end, we hold it is not generally  
 13 appropriate when there is nothing more at stake than a nominal fine. There must be  
 sufficient motivation for a full and vigorous litigation of the issue.

14 *Hadley, supra*,

15 “It is limited to the situation where retrial is not necessary if one or more of *the*  
 16 *crucial issues or determinative facts [were]determined in previous litigation.*” *Luisi Truck*  
 17 *Lines, Inc. v. Wash. Utils. & Transp. Comm’n*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967),  
 18 emphasis added. For this reason, “*collateral estoppel is not a technical defense to prevent a*  
 19 *fair and full hearing on the merits of the issues to be tried.*” *Hadley, supra*, 144 Wash.2d at  
 20 311, emphasis added. Thus, the central focus for this Court is “whether the parties to the  
 21 earlier proceeding had a full and fair hearing on the issue [which the subsequent litigation  
 22 addresses” *Id.* citing *Neff v. Allstate Ins. Co.*, 70 Wash.App. 796, 801, 855 P.2d 1223  
 23 (1993). Most important, the Court must determine whether the “party against whom the  
 24  
 25

estoppel is asserted [Mr Kivlin] had interests at stake that would call for a full litigational effort.” *Hadley*, citing 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 373, at 763 (5th ed.1996). Here, Kivlin has yet to have an opportunity to fully remedy the harm to his reputation caused by the BPD’s adoption or ratification of Ms. Schneider’s defamatory allegations.

Washington courts have developed a four-part test to analyze whether a previous litigation should have a collateral estoppel effect on a subsequent litigation. Collateral estoppel requires: “(1) identical issues; (2) a final judgment on the merits;<sup>3</sup> (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *Hadley*, *supra* at 311-12, emphasis added, quoting *Southcenter Joint Venture v. Nat’l Democratic Policy Comm’n*, 113 Wash.2d 413, 418, 780 P.2d 1282 (1989). Thus, application of collateral estoppel is generally limited to situations where, among other factors, the *issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding.*” Here, neither the first nor second nor, critically, the fourth element have been met in applying the doctrine to the CJTC proceedings.

## 2. *The Wallace v. Island County Case Does Not Control the Outcome of This Case.*

---

<sup>3</sup> Kivlin acknowledges that as he has not sought further review of the Superior Court’s judicial review of the proceedings before the CJTC, that decision operates as a final judgment on the claim brought before the CJTC. However, the CJTC can hear a petition for recertification should Kivlin choose to petition for that relief in the future.

Defendants contend that the unpublished case of *Wallace v. Island County* controls the outcome here. *Wallace v. Island County, et al*, No. C09–0823RSL, (W.D. Wash. 2011); 2011 WL 6210633. However, *Wallace* is distinguishable. While Judge Lasnik did find that certain factual findings of the CJTC had preclusive effect on Deputy Wallace’s §1983’s cause of action alleging discharge for First Amendment activity, i.e., the ***motivation for*** his discharge, the CJTC decision had no impact on his analysis of Wallace’s common law claims. *Id.* In fact, Judge Lasnik’s separate analysis of the defamation and false light claim does apply here. Unlike Deputy Wallace, Mr. Kivlin has produced admissible evidence that “[Ms. Schneider’s] story was false and that Defendants’ [publication] of the story was the result of actual malice or reckless disregard.” *Id.* Kivlin’s §1983 claim does not implicate the motives for his discharge but addresses the procedures used. The reasons for disposing of Wallace’s reputational harm claims are not present here nor are all the elements of Washington collateral estoppel present here.

***1. The Issues before The CJTC Were Not Identical to The Issues before This Court***

Washington courts have not articulated a precise test to determine whether subject matter is identical, but “[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties.” *Marshall v. Thurston Cty.*, 165 Wn. App. 346, 353 (2011) (quoting *Hayes v. City of Seattle*, 131 Wn.2d 706, 712 (1997)). As a result, Washington courts “generally focus on the asserted theory of recovery rather than simply the facts underlying the dispute.” *Id.*, *emphasis added*. Defendants’ assertion of the identical nature of the claims is not well taken. While the CJTC did effectively find that

1 Kivlin resigned in lieu of discharge, and arguably supports a constructive discharge theory,  
2 the CJTC findings and conclusions do not address the two forms of wrongful termination  
3 claims made by Kivlin. They deal with 1) representations made by BPD as to the process  
4 to be used in evaluating the claims against him, i.e., the implied contract/breach of  
5 promises of specific treatment claim; and 2) whether Kivlin's termination contravened a  
6 clear mandate of public policy protecting individual privacy interests that are found in  
7 Article 1, §7 of the Washington State Constitution.

8  
9 **2. *The Parties before the CJTC were not  
the same as the parties here.***

10 There has been no showing that the State of Washington's interest in decertifying  
11 police officers guilty of misconduct is the same interest implicated by the City of Bellevue  
12 in defending this claim. Simply because some of the facts giving rise to the hearing arose  
13 from Kivlin's work history with the City does not make it a party to the administrative  
14 proceedings below. Indeed, many collateral estoppel decisions involving employment  
15 decisions involve a fired or disciplined employee's attempt to relitigate the cause of their  
16 dismissal or the alleged illegal motive for that final employment action. See e.g.,  
17 *Christensen v. Grant County, et al.*, 152 Wash.2d 299 96 P.3d 957 (2004); *Reninger v.*  
18 *Dep't of Corr.*, 134 Wash.2d 437, 449, 951 P.2d 782 (1998); *Shoemaker v. City of*  
19 *Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987). Those do not apply here where  
20 the central focus of the proceedings is remedying the harm to Kivlin's reputation, and none  
21 of the evidentiary facts on those claims have been finally determined in the prior  
22 proceedings, as discussed *infra*.

3. ***Application of Collateral Estoppel Would Cause Substantial Injustice to Kivlin's Ability to Remedy the Reputational Harm Caused, in Part by the Defendants' Actions And Inactions***

Courts have concluded that “an administrative decision may have preclusive effect on a subsequent civil action where the parties had ample incentive to litigate issues even though the remedies available in the two arenas were not identical.” *Thompson v. Dep't of Licensing*, 138 Wash.2d 783, 796, 982 P.2d 601 (1999). Kivlin has had no opportunity to date to address, litigate, or remedy the reputational harm caused by the events giving rise to this litigation and the Defendants' central role in it. This not a simple matter of remedy but a matter of access to justice

**C. Plaintiff's Claims for Damages Are Not Barred by Absolute Witness Immunity**

Defendants assert that because some of Kivlin's common law claims are related to damage to his reputation from statements made by one or more of the individual defendants and/or other agents of the BPD, those claims are wholly barred by witness immunity. See Defendants' Brief at pp. 10-11. Kivlin *is not* seeking relief for any specific statements made under oath by Assistant Chief Arpin and/or Carl Kleinecht during the CJTC two-day hearing and concedes that such testimony is absolutely privileged. Rather, he is seeking recovery for statements made by agents of the City of Bellevue regarding the reasons for his arrest and separation from employment to members of the media and/or prospective employers that exceeded any conditional privilege it might have had. See Section D *infra*. Thus, the doctrine of witness immunity has no place in the present litigation.

**D. There Are Genuine Issues Of Material Fact**

PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-19  
2:20-cv-00790 RSM

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**In Dispute as to Kivlin's' Defamation  
and Injurious Falsehoods Claims**

As other courts have recognized:

The common law, developed over hundreds of years, has long recognized a remedy for damage to reputation from defamation. See Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 547-61 (1903) (reviewing how early laws, including Roman, Christian, Germanic, and English law, protected a person's reputation); 1 William Blackstone, *Commentaries on the Law of England in Four Books* (1753) ("The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right."). Significant litigation vindicating an individual's right to protect reputation emerged as early as the seventeenth century.

*Larson v. Gannett Co.*, 940 N.W.2d 120 (Minn. 2020). There is no dispute that Kivlin's reputation has been damaged. It was damaged in significant part by his employer's negligence and failure to investigate the reliability of Ms. Schneider's reports and her veracity and history of false reporting before implementing the draconian internal investigations over many months and not ensuring the accuracy of its agents' statements in the events before and after Kivlin's arrest and eventual separation from work.

Under Washington law, a "defamation action consists of four elements: (1) a false statement [about the plaintiff], (2) publication, (3) fault, and (4) damages." *Duc Tan v. Le*, 177 Wash.2d 649, 662, 300 P.3d 356 (2013). Generally, in defamation cases, "[t]he standard of proof at trial also applies at summary judgment." *Wood v Battleground School District*, 107 Wash.App. 550, 557 27 P.3d 1208 (2001) [public employee states claim for defamation and abuse of privilege by statements to the press that her work performance was "lacking."]

1 and citing *Haueter v. Cowles Publ'g Co.*, 61 Wash.App. 572, 581, 811 P.2d 231 (1991). The  
 2 *Wood* court noted:

3 The trial court erred in concluding that there was not an issue as to whether Sharp's  
 4 statement was false. Sharp's statement to the press implied there were provable facts  
 5 to support his conclusion that Wood's performance as communications coordinator  
 6 was lacking and it suggested that Wood's deficient job performance was the basis for  
 7 her reassignment and/or for the decision not to renew her contract..... Further, Wood  
 8 provided substantial evidence contradicting Sharp's evidence about the quality of her  
 9 work, including a performance evaluation and the declarations of her supervisors and  
 10 other staff. *Thus, reasonable persons could differ on the truth or falsity of Sharp's*  
 11 *statement. See Wilson*, 98 Wash.2d at 437, 656 P.2d 1030.

12 *Id.*

13 The *Wood* court reversed summary judgment on the issue of "falsity." *Id.* Here too  
 14 there is ample evidence of the falsity of the allegations of assault communicated by Chief  
 15 Arpin and other unknown agents of BPD in contact with the press and/or in the implications  
 16 left by failing to correct the record in information provided to prospective employers. A  
 17 plaintiff can allege the false statement prong by alleging facts that show the statement is  
 18 provably false or "leaves a false impression due to omitted facts." See *Yeakey v. Hearst*  
 19 *Commc'ns, Inc.*, 234 P.3d 332, 335. "Defamation by implication occurs when 'the  
 20 defendant juxtaposes a series of facts so as to imply a defamatory connection between  
 21 them.'" *Corey v. Pierce Cty.*, 225 P.3d 367, 373 (2010), other citations omitted. It is for the  
 22 Court to determine the "sting" of the report. "The 'sting' of a report is defined as the gist  
 23 or substance of a report when considered as a whole." *Herron v. King Broad*, 776 P.2d 98,  
 24 102 (1989). "Where a report contains a mixture of true and false statements, a false  
 25 statement (or statements) affects the 'sting' of a report only when 'significantly greater

1 opprobrium' results from the report containing the falsehood than would result from the  
 2 report without the falsehood." *Herron, supra*. The *Wood* Court noted

3 Sharp's statements to the press regarding Wood's reassignment and nonrenewal of  
 4 her contract were true. But his reference to Wood's deficient performance added a  
 5 distinctly different "sting," suggesting to a reasonable reader that the deficiency was  
 the reason for the reassignment and nonrenewal. ...

6 "A defamatory publication is libelous per se (actionable without proof of special  
 7 damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy,  
 8 to deprive him of the benefit of public confidence or social intercourse, or (2)  
 9 injures him in his business, trade, profession or office." [citation omitted]. While a  
 10 court generally determines whether a statement is libelous per se if the issue  
 involves "the rather vague areas of public confidence, injury to business, etc.," then  
 it becomes a question of fact for the jury.... Whether Sharp's statement was libelous  
 per se involves this more vague area of public confidence and injury to Wood's  
 pecuniary interest and, thus, it is a question for the jury.

11 *Wood, supra*, other citations omitted. As in *Wood*, a jury could conclude that the sting and  
 12 implication of Arpin's comments were that Kivlin did commit an assault and can make the  
 13 decision of whether statements were made with reckless disregard for the truth..

14 Defendants argue that Chief Arpin's statements to the press on April 28 regarding  
 15 Mr. Kivlin's arrest was simply a matter of opinion. Washington courts have recognized that  
 16 "the line between fact and opinion is sometimes blurry...." *Dunlap v. Wayne*, 105 Wash.2d  
 17 529, 539, 716 P.2d 842 (1986). The Court must consider: "(1) the medium and context in  
 18 which the statement was published, (2) the audience to whom it was published, and (3)  
 19 whether the statement implies undisclosed facts." *Id.* Whether a statement is one of fact or  
 20 opinion is a question of law unless the statement could only be characterized as *either fact or*  
 21 *opinion*. *Id.* at 540 n. 2. Here, the gist of Assistant Chief Arpin's statement to the press on  
 22 April 28 is that Kivlin's arrest was justified and/or that he committed a serious infraction  
 23  
 24  
 25

1 warranting his arrest and probable guilt. Chief Arpin clearly had no personal knowledge of  
2 the alleged conduct and had no reason to make that statement. A jury could find that  
3 Assistant Chief Arpin's statement was not solely an opinion but a factual representation  
4 about Kivlin's character and behavior. The comment implied directly that Kivlin had  
5 engaged in misconduct and was likely guilty of assaulting Ms. Schneider. He did so  
6 negligently as a reasonably prudent public official would have declined to comment on such  
7 a serious allegation knowing the consequences for Kivlin.  
8

9 Defendants assert that as Kivlin's name was not mentioned, "statements that do not  
10 identify Kivlin by name are not actionable." This representation is a misstatement of the law. As  
11 the Washington appellate court stated in *Sims v. KIRO, Inc* "this is not to say that it is  
12 necessary that a plaintiff be mentioned by name in order to recover damages, but it is  
13 sufficient if viewers, hearers or readers will conclude from a perusal of the article that the  
14 plaintiff is the one against whom publication is aimed." *Id. citing Ryan v. Hearst*  
15 *Publications, Inc.*, 3 Wn.2d 128, 100 P.2d 24 (1940). As the *Sims* court noted, "[t]he test is  
16 not whom the story intends to name but who a part of the audience may reasonably think is  
17 named...." *Sims*, supra. Here, the comments made referred to a sixteen year veteran of the  
18 BPD; only a handful of officers met that criteria. Coupled with the public record made by  
19 his arrest, Kivlin's identity could easily be discerned. Specifically, it could easily be  
20 correctly identified by those with whom he already had an unblemished reputation, e.g., his  
21 peers on the force and others in the greater law enforcement and/or professional community.  
22 Kivlin has already provided testimony that at least one prospective employer concluded that  
23 he had committed multiple felonies, a clearly defamatory statement. Summary judgment on  
24  
25

26 PLAINTIFF'S RESPONSE TO  
27 DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-23  
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1 this element is premature as Kivlin should have a further opportunity to develop the record  
 2 as to who has who received information about the untrue allegations made in the BPD  
 3 investigation. Additionally, it is undisputed that public records responses containing  
 4 defamatory information about Kivlin have already been made.

5 **1. Washington should Adopt the Compulsory**  
 6 **Self-Publication Doctrine**

7 Since his separation from employment, Kivlin has sought employment in a variety of  
 8 settings using his investigatory skills and law enforcement background. *See* Kivlin Dec. at  
 9 ¶¶ 3-4. In many of those instances, he had been required as a part of his application to  
 10 disclose the circumstances of his separation from BPD and he sought a neutral or other  
 11 reference from BPD. To date, he has not obtained such employment and has been  
 12 informed that his truthful disclosures are inhibiting his ability to be considered for such  
 13 employment, even when the underlying allegations have not been verified. *Id.* It is long  
 14 overdue for Washington to recognize the applicability of the doctrine of compulsory self-  
 15 publication in defamation and other reputational harm cases. It has been recognized by  
 16 other courts.<sup>4</sup> *See e.g., Lewis v. Equitable Life Insurance Co.* 389 N.W.2d 876 (1986);  
 17 *McKinney v. County of Santa Clara*, 110 Cal.App.3d 787, 168 Cal.Rptr. 89 (1980);  
 18 *Colonial Stores, Inc. v. Barrett*, 73 Ga. App. 839, 38 S.E.2d 306 (1946); *Belcher v. Little*,  
 19 315 N.W.2d 734 (Iowa 1982); *Grist v. Upjohn Co.*, 16 Mich.App. 452, 168 N.W.2d 389  
 20 (1969); *Bretz v. Mayer*, 1 Ohio Misc. 59, 203 N.E.2d 665 (1963); *First State Bank of*  
 21 *Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex.Civ.App.1980). These courts have recognized  
 22  
 23  
 24

25 <sup>4</sup> Kivlin acknowledges that Washington courts thus far have rejected application of this doctrine.

1 that if a defamed person is in some way compelled to communicate the defamatory  
 2 statement to a third person, and if it was foreseeable to the defendant that the defamed  
 3 person would be so compelled, then the defendant could be held liable for the defamation.  
 4 Several courts have specifically recognized its applicability in the job search context. *See*  
 5 *e.g. Lewis v. Equitable, supra, Grist v. Upjohn Co., supra*. As in those cases, it was  
 6 completely foreseeable in this case that Kivlin would be forced to repeat the defamatory  
 7 allegations to prospective employers, which has caused him significant economic and  
 8 emotional harm. *See Kivlin Dec at ¶¶ 3-4*.

10 Kivlin can produce, and should be given the opportunity to further develop,  
 11 evidence that is probative of any qualified privilege alleged by the individual defendants  
 12 and/or the BPD. Even if a qualified privilege exists under the common law to speak to  
 13 prospective employers, as indicated above, that can be rebutted by a showing that the  
 14 statements were made with actual malice. Similarly any alleged immunity found in RCW  
 15 4.24.470 is premised on good faith and the “presumption of good faith ... [can be] rebutted  
 16 upon a showing by clear and convincing evidence that the information disclosed by the  
 17 employer was knowingly false, deliberately misleading, or made with reckless disregard  
 18 for the truth.” Questions of motive and good faith are issues for a jury, not this Court.

20 **E. There Are Genuine Issues of Material Fact**  
 21 **in Dispute as to Kivlin’s Invasion of Privacy**  
 22 **Claim under a False Light Theory**

23 Kivlin also states fact which support a viable false light/invasion of privacy claim.

24 Washington has adopted Restatement (Second) of Torts § 652E, recognizing  
 25 invasion of privacy by false light as an independent claim. *Eastwood v. Cascade*  
*Broad. Co.*, 106 Wash.2d 466, 471, 473-74, 722 P.2d 1295 (1986). Defamation and

invasion of privacy by false light are similar, yet distinct, causes of action. *See Eastwood*, 106 Wash.2d at 470-471, 722 P.2d 1295. Although both actions rest on the disclosure of false or misleading information, they require different elements and allow for recovery of different damages. *Duc Tan v. Le*, 177 Wash.2d 649, 662, 300 P.3d 356 (2013); *Eastwood*, 106 Wash.2d at 470-71, 722 P.2d 1295. ....

“The theoretical difference between the two torts is that a defamation action is primarily concerned with compensating the injured party for damage to reputation, while an invasion of privacy action is primarily concerned with compensating for injured feelings or mental suffering.” *Eastwood*, 106 Wash.2d at 471, 722 P.2d 1295. A plaintiff does not need to be defamed in order to bring a false light claim, but any defamation action potentially gives rise to a false light claim. *Eastwood*, 106 Wash.2d at 471, 722 P.2d 1295.

*Sequist v. Caldier*, 438 P.3d 606 (2019). Thus, a false light claim arises when a person publishes even truthful statements that place another in a false light if (1) the false light would be highly offensive and (2) the publisher knew or recklessly disregarded the falsity of the publication and the subsequent false light it would place the other in.

*Eastwood*, 106 Wash.2d at 470-471, 722 P.2d 1295; Restatement (Second) of Torts § 652E (1977). Here, Kivlin has provided ample evidence that he was placed in a false light by the statement of Assistant Chief Arpin and that Assistant Chief Arpin should have known the impact of the publication of the statements attributed to him.

**F. There Are Genuine Issues of Material Fact in Dispute as to Kivlin’s Claims for Constructive Discharge that Preclude Dismissal of this Claim as a Matter of Law**

***1. Kivlin Has Established Factual Dispute that Support the Elements of Constructive Discharge***

In asserting the collateral estoppel effect of the CJTC proceedings and findings, Defendant is forced to concede that Kivlin allegedly resigned in lieu of discharge. That is not because he would have inevitably been discharged but because of the intolerable

1 conditions he faced. The elements of a claim of constructive discharge are that (1) the  
 2 employer deliberately made working conditions intolerable, (2) a reasonable person in the  
 3 employee's position would be forced to resign, (3) the employee resigned because of the  
 4 intolerable condition and not for any other reason, and (4) the employee suffered damages  
 5 as a result of being forced to resign. *Peiffer v. Pro-Cut Concrete*, 6 Wn. App. 2d at 829, 431  
 6 P3d 1018 (2018). Whether working conditions became intolerable generally is a question of  
 7 fact for the jury. 16A David K. DeWold and Keller W. Allen, Washington Practice Port  
 8 Law and Practice § 24:2 (4th ed. 2013).

9  
 10 **2. *There are Factual Disputes as to Defendant BPD's Breach of***  
 11 ***Promises of Specific Treatment in its Actions and Inactions***  
 12 ***During the Internal Investigation of Kivlin That Proximately***  
 13 ***Caused His Constructive Discharge***

14 Kivlin asserts that he was forced to resign in substantial part because BPD and the  
 15 individual defendants refused to afford him the same treatment it afforded others such as  
 16 Chief Mylett, i.e., suspending disciplinary action pending the outcome of criminal  
 17 investigation and prosecution if necessary. Had it done so, Kivlin would likely have not  
 18 been separated from the City. The Washington Supreme Court in *Burnside v. Simpson*  
 19 *Paper Co.* noted that whether an employment policy manual issued by an employer  
 20 contains a promise of specific treatment in specific situations, whether the employee  
 21 justifiably relied on the promise, and whether the promise was breached are questions of  
 22 fact. *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 104-05 (1994). "Only if reasonable  
 23 minds could not differ in resolving these questions, is it proper for the trial court to decide  
 24 them as a matter of law." *Id.* (other citations omitted). Here, as noted by the declarant Bryce  
 25

Corey, it was common practice to stay discipline because of criminal charges and investigations. Kivlin's reliance on those statements all are factual questions for the jury.

**3. *There are Factual Disputes as to Whether Defendant BPD Violated a Clear Mandate of Public Policy in its Actions and Inactions Leading to Kivlin's Constructive Discharge***

A cause of action for wrongful discharge in violation of public policy may be based on either an express or constructive discharge. *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wash.App. 34, 43, 181 P.3d 864 (2008). In appellate decisions reviewing claims for constructive wrongful termination in violation of public policy, courts commonly examine separately the elements of the tort and the elements of constructive discharge. Kivlin has introduced evidence as to each element of a claim for wrongful termination in violation of public policy. They are that (1) the employee's discharge may have been motivated by reasons that contravene a clear mandate of public policy, and (2) the public-policy-linked conduct was a significant factor in the decision to discharge the worker. *Martin v. Gonzaga Univ.*, 191 Wash.2d 712, 425 P.3d 837, 844 (2018). In a recent case, Division III upheld the following jury instruction:

It is public policy that a person has the legal right or privilege to be free from deliberate intrusions into her seclusion in a manner that is highly offensive or objectionable to a reasonable person. The intruder must have acted deliberately to achieve the result with the certain belief that the result would happen.

*Ritchey v. Sound Recovery*, (No. 53303-1-II) ( Div III. 2020)

This is the basis for Kivlin's public policy claim. This policy, found in the common law and the Washington State Constitution are implicated by the circumstances surrounding Kivlin's separation from BPD. The causal nexus is for the jury.

PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-28  
2:20-cv-00790 RSM

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## H. Kivlin's § 1983 Claims are Actionable

### 1. Elements of Kivlin's §1983 Claim

To state a claim for relief in an action brought under § 1983, Kivlin must establish that he was deprived of a federally protected right and that the alleged deprivation was committed under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). The Fourteenth Amendment's guarantee of due process applies when either a constitutionally protected liberty or property interest is at stake. *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777 (9th Cir. 1982). A due process claim requires the court to ask "(1) Was the plaintiff deprived of a protected interest; and (2) if so, what process was due?" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); see also *Mishler v. Nev. State Bd. of Med. Examiners*, 896 F.2d 408, 409 (9th Cir. 1990).

A § 1983 claim based upon procedural due process contains two elements: 1) a deprivation of liberty or property interest protected by the Constitution; and 2) a denial of adequate procedural protections. *Brewster v. Board of Education of the Lynwood Unified School District*, 149 F.3d 971, 982 (9th Cir.1998). To state a claim under the Due Process Clause, Plaintiff must first establish he possessed a property interest deserving of constitutional protection. *Id.* In this case, it is undisputed that as a career officer, Kivlin had property interest in his continued employment with the BPD and that the essential requirements of interest is notice and an opportunity to respond before he is discharged. *Cleveland Board of Education v. Loudermill et al.*, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Pre-termination process need only include oral or written notice of the charges against the employee, an explanation of the employer's evidence, **and an**

1 **opportunity for the employee to present his side of the story.** *Gilbert v. Homar*, 520 U.S.  
 2 924, 928, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997), emphasis added.

3 **2. Defendant BPD Violated Kivlin's Right to Procedural Due**  
 4 **Process**

5 The opportunity to present reasons why a proposed action should not be taken is a  
 6 fundamental due process requirement. *Loudermill*, 470 U.S. at 546. The key component of  
 7 due process, when a decision maker is acquainted with the facts, is the assurance of central  
 8 fairness. *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 779 (9<sup>th</sup> Cir.1982).

9 "Fairness" is a flexible notion, but one must at least be given notice and an opportunity to  
 10 be heard at a meaningful time and in a meaningful manner. *Id.* (other citations omitted). It  
 11 is undisputed that Kivlin was not given that opportunity. Defendants assert that his union  
 12 indicated that he did not want the *Loudermill* but the exhibits to the Chin declaration are  
 13 inconsistent with her oral representation. Mr. Kivlin has not testified that he waived that  
 14 right; thus, sufficient factual disputes exist as to the reason for not affording him the  
 15 *Loudermill* hearing or any other post-separation name clearing hearing to preclude  
 16 summary judgment on his due process claim under §1983.

17  
 18 **3. Defendant BPD Violated Kivlin's Right to Equal**  
 19 **Protection of the Law**

20 As the Court is well aware, the Equal Protection Clause of the Fourteenth  
 21 Amendment requires similar treatment under the law for similarly situated people. U.S.  
 22 Const. amend. XIV, § 1; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105  
 23 S.Ct. 3249, 87 L.Ed.2d 313 97\*97 (1985); *State v. Ward*, 123 Wash.2d 488, 515, 869 P.2d  
 24 1062 (1994). A §1983 claim can arise from violation of this provision. In the record at the  
 25

26 PLAINTIFF'S RESPONSE TO  
 27 DEFENDANT'S MOTION FOR  
 SUMMARY JUDGMENT-30  
 2:20-cv-00790 RSM

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1 CJTC and here, Kivlin has established that other individuals employed by BPD use the  
 2 ACCESS data base for allegedly “personal” purposes without the draconian disciplinary  
 3 consequences suffered by Kivlin. See Corey Dec. at ¶5. In the hearing below, Assistant  
 4 Chief Arpin acknowledged his awareness of at least one situation involving a BPD officer  
 5 during his leadership of the Department. Dkt 16-1, Ex. A 00914-00923. Similarly, it is  
 6 undisputed that Kivlin was subject to proposed discipline in part for failing to report to a  
 7 fatality accident on his scheduled day off and for allegedly misrepresenting his reason for  
 8 unavailability. His supervisor at the time indicated that it was not necessary after learning  
 9 about his whereabouts as he did with Officer Welty as both had personal family  
 10 commitments that day. It is for the jury to determine whether Mr. Kivlin’s credibility once  
 11 the Court determines that they were similarly situated as a matter of law and should have  
 12 been held to the same standard of conduct. These facts give rise to an Equal Protection  
 13 claim that turns on credibility of Mr. Kivlin. See Dkt 16-1, Ex. A, pp. 000784-804.

#### 14 15 16 **4. The Individual Defendants are Not Subject to Qualified Immunity**

17 Qualified immunity “shield[s] officials from harassment, distraction, and liability  
 18 when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231  
 19 (2009). To overcome that immunity, a plaintiff must show (1) the violation of a  
 20 constitutional right and (2) that the right was clearly established at the time of the alleged  
 21 misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). *Pearson, supra*. A government  
 22 official’s conduct violates clearly established law when, at the time of the challenged  
 23 conduct, a reasonable official would understand that the actions violated the rights of the  
 24  
25

26 PLAINTIFF’S RESPONSE TO  
 27 DEFENDANT’S MOTION FOR  
 SUMMARY JUDGMENT-31  
 2:20-cv-00790 RSM

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1 plaintiff. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). To be clearly established, a right's  
 2 contours must be "sufficiently definite that any reasonable official in the defendant's shoes  
 3 would have understood that he was violating it" and that "existing precedent . . . placed the  
 4 statutory or constitutional question confronted by the official beyond debate." *Plumhoff v.*  
 5 *Rickard*, 572 U.S. 765, 778-79 (2014) (quoting *al-Kidd*, 563 U.S. at 741). Here a public  
 6 employee's right to procedural due process before termination is well established. There is  
 7 no dispute here that Kivlin was not afforded such an opportunity. Why that occurred will be  
 8 the subject of further discovery and litigation. The individual defendants are not entitled to  
 9 qualified immunity on this claim. Similarly, the right to held to the standard of conduct and  
 10 subject to equal protection of the law is well established. The individual defendants are not  
 11 entitled to qualified immunity for that claim either. Courts "do[] not require a case directly  
 12 on point for a right to be clearly established, [but] existing precedent must have placed the  
 13 statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148,  
 14 1152 (2018). The contours of a right must be "sufficiently definite that any reasonable  
 15 official in the defendant's shoes would have understood that he was violating it." *Kisela*,  
 16 138 S. Ct. at 1153.

19 **J. Defendants Have Not Established any Basis for an Award**  
 20 **of Attorneys' Fees in its Favor**

21 Without foundation, Defendants asserts an entitlement to their attorneys' fees and  
 22 cost simply because it attempted unsuccessfully to secure Mr. Kivlin's agreement to  
 23 dismiss this litigation. As the entire CJTC record was available from the Superior Court, is  
 24 disingenuous to seek recovery of the costs of that production. This case Is not frivolous as  
 25

1 there are debatable issues upon which reasonable minds might differ, and it is not so totally  
2 devoid of merit that there was no reasonable possibility' of success.. *See In re Recall of*  
3 *Feetham*, 149 Wash.2d 860, 872, 72 P.3d 741 (2003); *Millers Cas. Ins. Co. of Texas v.*  
4 *Briggs*, 100 Wash.2d 9, 15, 665 P.2d 887 (1983). Here, no such overwhelming evidence or  
5 legal precedent is present While the parties' clearly dispute the application of certain cases,  
6 Defendants have not shown they are entitled to judgment as a matter of law on all of Mr.  
7 Kivlin's claims.

## 8 VI. CONCLUSION

9 For all of these reasons, this Court should deny Defendants' motion in its entirety  
10 and order that discovery proceed so that Mr. Kivlin can remedy the wrongs addressed in his  
11 complaint.  
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**CERTIFICATE OF SERVICE**

I, Patricia S. Rose, declare under penalty of perjury that on the date below, I caused to be filed the above Amended-Corrected Response Brief, and Amended Declaration of, John Kivlin, and have served upon the Defendant to the individuals and via the method of service listed below, a true and correct copy of the foregoing documents.

| Party                                    | Method of Service                |
|--|----------------------------------|
| Jayne Freeman,<br>Attorney for Defendant | x E-Mail<br>x E-Service by court |
| Derek Chen<br>Attorney for Defendant     | x E-Mail<br>x E-Service by court |

Dated: May 11, 2021.

s/ Patricia S. Rose

PLAINTIFF'S RESPONSE TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT-34  
2:20-cv-00790 RSM

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